Supreme Court, U.S.
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No. 99-641

In the Supreme Court of the United States

MICHAEL H. STEINHARDT, PETITIONER

v.

UNITED STATES OF AMERICA
AND REPUBLIC OF ITALY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts applied the proper test for materiality in determining that the Customs forms filed in connection with the importation of the defendant artifact contained materially false statements.

2. Whether petitioner was an innocent owner of the defendant artifact, and, if so, whether its forfeiture violated petitioner's due process rights.

3. Whether the forfeiture of the defendant artifact under the Customs laws violated the Excessive Fines Clause of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 184 F.3d 131. The opinion of the district court (Pet. App. 21a-49a) is reported at 991 F. Supp. 222.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1999. The petition for a writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil *in rem* proceeding, the United States sought the forfeiture of an antique gold platter known

as a Phiale pursuant to 18 U.S.C. 545 and 19 U.S.C. 1595a(c). Pet. App. 5a. The district court granted the government's motion for summary judgment and ordered the Phiale forfeited. Pet. App. 21a-51a. The court of appeals affirmed. Pet. App. 1a-20a.

1. The defendant Phiale is of Sicilian origin and dates from the 4th Century B.C. Pet. App. 3a. In 1991, William Veres, a Swiss art dealer, obtained the Phiale from a Sicilian coin dealer in exchange for goods worth approximately $90,000. *Ibid.* Veres then brought the Phiale to the attention of Robert Haber, a New York art dealer who had previously sold many expensive objects to petitioner. *Id.* at 3a, 24a-25a. In November 1991, Haber traveled to Sicily to examine the Phiale. *Id.* at 3a. Acting on petitioner's behalf, Haber agreed to purchase the Phiale for slightly more than $1 million. *Ibid.* In the Terms of Sale, Haber and Veres agreed that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." *Id.* at 4a. On December 6, 1991, petitioner wired the first installment of the purchase price to Veres. *Id.* at 26a.

On December 10, 1991, Haber flew from New York to Zurich, Switzerland. Pet. App. 4a. From Zurich, Haber proceeded to a Swiss town near the Italian border, where he took possession of the Phiale. *Ibid.* Haber's customs broker in New York prepared Customs forms for the Phiale. The forms listed Switzerland, not Italy, as the Phiale's country of origin; and it listed $250,000, rather than the more than $1 million petitioner had paid, as the Phiale's value. *Id.* at 4a-5a. Haber then returned from Zurich to the United States with the Phiale, eventually presenting it to petitioner. *Id.* at 5a. After the Metropolitan Museum of Art examined the

Phiale and determined that it was authentic, petitioner wired the remainder of the purchase price to Veres' account; he also wired a 15% commission to Haber. *Id.* at 5a, 28a-29a. From 1992 through 1995, petitioner displayed the Phiale in his home. *Id.* at 5a.

2. On February 16, 1995, the Italian Government submitted a Letters Rogatory Request to the United States seeking assistance in investigating the importation of the Phiale into the United States and in obtaining its return to Italy. Pet. App. 5a, 29a. A United States Magistrate Judge found probable cause to believe that the Phiale was subject to civil forfeiture and issued a seizure warrant. *Ibid.* Acting pursuant to that warrant, on November 9, 1995, United States Customs Service agents seized the Phiale from petitioner's home. *Ibid.*

On December 13, 1995, the United States filed a civil forfeiture action seeking forfeiture of the Phiale pursuant to 18 U.S.C. 545 and 981(a)(1)(C) and 19 U.S.C. 1595a(c). Pet. App. 5a, 30a. The complaint, as amended on February 13, 1996, alleged that the Phiale had been imported into the United States in violation of 18 U.S.C. 542 because of materially false statements on the Customs forms. Pet. App. 30a.[1] In addition, the complaint alleged that the Phiale had been exported from Italy in violation of an Italian law establishing a presumption that an archaeological item belongs to the state absent proof that the item was privately owned before 1902. *Id.* at 5a, 30a.

Petitioner entered the forfeiture proceeding as a claimant, and the parties filed cross motions for sum-

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[1] The district court's opinion mistakenly refers to the date of the First Amended Complaint as February 13, 1995, rather than February 13, 1996. Pet. App. 30a.

mary judgment. Pet. App. 6a, 30a-31a, 33a-34a. In a Memorandum and Order dated November 14, 1997, the district court granted summary judgment to the United States. *Id.* at 21a-49a. The court agreed that Haber, by identifying Switzerland as the country of origin of the Phiale, had made a materially false statement on the Customs forms, in violation of 18 U.S.C. 542, and that the Phiale was therefore subject to forfeiture under 18 U.S.C. 545. Pet. App. 33a-39a. In reaching that determination, the court employed the standard of materiality advocated by the government, *i.e.*, that the false statement had a "natural tendency" to influence Customs officials, rather than the "rigid 'but for' standard" advanced by petitioner. *Id.* at 35a-39a. The court explained that the "natural tendency" standard "is consistent with the language of the statute, which prohibits importations 'by means of' false statements," and is "also consistent with the fundamental purpose of the statute," which is to maintain the integrity of the importation process by ensuring full disclosure. *Id.* at 36a. The court added that "[t]ruthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity * * * was being exported from a country with strict antiquity-protection laws." *Id.* at 38a. That information, the court continued, would "have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole." *Id.* at 38a-39a.

The district court also rejected petitioner's claim that he had a defense to forfeiture as an "innocent owner." Pet. App. 39a-42a. "Section 545," the district court concluded, "does not permit an innocent owner defense." *Id.* at 39a. The court therefore granted the govern-

ment's motion for summary judgment under Section 545. *Id.* at 48a.

As an alternative basis for its ruling, the district court concluded that the Phiale was subject to forfeiture under 19 U.S.C. 1595a(c). Pet. App. 42a-45a. Noting both that "Haber took great effort to ensure that the Phiale was not exported directly from Italy" and that Haber "invoked the Fifth Amendment at a deposition and refused to answer any questions regarding the Phiale's purchase or importation," the court found "probable cause to believe that Haber knew the Phiale was stolen when he imported it." *Id.* at 44a-45a. The court also concluded that Section 1595a(c) does not provide an "innocent owner" defense. *Id.* at 45a.

Finally, the district court rejected petitioner's argument that forfeiture of the Phiale was an excessive fine under the Eighth Amendment. Pet. App. 45a-48a. The court explained that forfeiture of goods imported in violation of the customs laws "serves remedial rather than punitive purposes because it prevents forbidden merchandise from circulating in the United States and reimburses the Government for investigation and enforcement expenses." *Id.* at 46a. Moreover, the court determined that, even if the Eighth Amendment "were implicated" in this case, forfeiture of the Phiale would not be particularly harsh, because petitioner would be "entitled to a full refund of the purchase price" under the Terms of Sale. *Id.* at 47a. In contrast, the court found, "the offense at issue here is grave," because "it involves the trafficking of a cultural antiquity by means of false statements." *Id.* at 48a. The court also noted that "the extent of [petitioner's] culpability is unclear," explaining that his "experience as an art collector" and his provision "for the risk of seizure that eventually

occurred[] both detract from his claim of innocence." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-20a. It agreed with the district court that "importation of the Phiale violated [Section] 545 because of the false statements on the customs forms." *Id.* at 6a. In particular, the court of appeals explained, "the designation of Switzerland as the Phiale's country of origin and the listing of its value of $250,000 were false." *Id.* at 8a. The court of appeals further held that, while "Section 542 does include a materiality requirement," *ibid.*, the "natural tendency" test adopted by the district court, rather than petitioner's "but for" test, was the proper test for materiality. *Id.* at 9a-12a.

The court of appeals then rejected petitioner's argument that "even under a natural tendency test" the misstatements on the Customs forms were not material. Pet. App. 12a. The court explained that Customs officials are directed to determine whether imported property is subject to a claim of foreign ownership, and "[a]n item's country of origin is clearly relevant to that inquiry." *Id.* at 12a-13a. According to the court of appeals, "a reasonable customs official would certainly consider" the possibility that the Phiale had "been exported in violation of Italian patrimony laws," and thus the fact that the Phiale was from Italy "would * * * be of critical importance" in deciding whether to seize the Phiale. *Id.* at 13a.

The court of appeals also rejected petitioner's "innocent owner" defense. Pet. App. 16a-17a. It relied on this Court's decisions in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), which "traced the long history of forfeiture laws that did not provide for such a defense," and *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which

reaffirmed the historical irrelevance of innocence of the owner in forfeiture law. Pet. App. 17a.

Finally, the court of appeals rejected petitioner's Eighth Amendment claim. It distinguished *Bajakajian* on the grounds that "the forfeiture here was not part of a criminal prosecution," Pet. App. 18a, and that "Section 545 is a customs law, traditionally viewed as nonpunitive." *Id.* at 19a. The court of appeals thus concluded that the Phiale was "classic contraband, an item imported into the United States in violation of law," the forfeiture of which is "nonpunitive and outside the scope of the Excessive Fines Clause." *Id.* at 19a-20a.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that there is a division of appellate authority concerning the proper standard of materiality under 18 U.S.C. 542. Although there is language in cases from other circuits that could be read to support the view that "[t]he circuits are divided as to the proper test," Pet. App. 9a, the facts of the decided cases indicate that any such disagreement that presently exists is of uncertain scope and its resolution would not assist petitioner in any event. Accordingly, further review is not warranted.

a. As petitioner (Pet. 9, 10-11) and the court of appeals (Pet. App. 9a) both note, the First and Third Circuits, like the court of appeals here, have indicated that a false statement is material under Section 542 if it has a "natural tendency to influence" customs officials or the customs and importation process—that is, if "a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties." Pet. App. 10a, 11-12a (internal quotation marks omitted). See *United States* v. *Holmquist*, 36 F.3d 154, 159 (1st Cir. 1994) ("a false statement is

material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole," without regard to "actual causation" or "actual harm"), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Bagnall*, 907 F.2d 432, 436 (3d Cir. 1990) (expressing view that a false statement under Section 542 is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way"). That position is consistent with this Court's view that the materiality of a false statement is generally determined by the "natural tendency" test. *Neder* v. *United States*, 119 S. Ct. 1827, 1837 (1999) ("[i]n general," the materiality of a false statement is determined by the "natural tendency" test); *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (applying the "natural tendency" test of materiality to false statements under 18 U.S.C. 1001); *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (in prosecution under 8 U.S.C. 1451(a), stating that a "misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed").

Petitioner, however, contends that the decision in this case (and those of the First and Third Circuits) conflicts with *United States* v. *Teraoka*, 669 F.2d 577, 579 n.3 (9th Cir. 1982), and *United States* v. *Corcuera-Valor*, 910 F.2d 198, 199 (5th Cir. 1990). In particular, petitioner contends that the Fifth and Ninth Circuits require proof that, but for the false statement, the importation would not have occurred. See Pet. 9 (describing those cases as holding that "a 'but for' test is the more appropriate standard" for determining materiality); Pet. 11 (statute's use of the words "by means of"

"clearly supports the conclusion that the government must demonstrate that the false statement actually caused the importation of the goods into the country."); Pet. App. 9a (Petitioner "argues for a 'but for' test of materiality, *i.e.*, a false statement is material only if a truthful answer on a customs form would have actually prevented the item from entering the United States.").

Both *Teraoka* and *Corcuera-Valor*, however, involved false pricing information that did not even have the *potential*—much less a natural tendency—to affect whether or not importation would have occurred. See *Teraoka*, 669 F.2d at 579; *Corcuera-Valor*, 910 F.2d at 200. Thus, on the facts of those cases, the defect was not the absence of but-for causation. It was, as the courts of appeals in those cases explained, the absence of *any* "relationship" or "logical nexus" between the false statement and actual importation. See *Teraoka*, 669 F.2d at 579 & n.3 (prosecution had not met its burden because it had not shown that "the false statements * * * had *some relationship* to the actual importation of the goods in the country") (emphasis added); *Corcuera-Valor*, 910 F.2d at 200 (government had not shown some "logical nexus" between the false statements and "the actual importation" of merchandise).[2] Thus neither court was required to decide the nature or degree of logical relationship and nexus that the government is required to prove.

Here, in contrast, there was no want of logical relationship or nexus, and both the district court and court

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[2] As the court of appeals explained in *Corcuera-Valor*, the defendants were permitted "to import their shirts regardless of the price on the invoice" and even truthful information would not affect "the ability of the defendants to import these particular goods." 910 F.2d at 200.

of appeals found a strong relationship between the importation of the Phiale and the false statements regarding country of origin. As the court of appeals explained, official Customs policy requires officers to determine whether property being imported is "subject to a claim of foreign ownership" and to seize property subject to such claims. Pet. App. 13a. Because the Customs Service considers "violations of a nation's patrimony laws" enforceable under that policy, the facts that the Phiale was not only very valuable but also from Italy—a country with very strict patrimony laws respecting archaeological artifacts—"would [have been] of critical importance" to any reasonable customs official. *Ibid.* See also *id.* at 38a-39a (Because "[t]ruthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity * * * was being exported from a country with strict antiquity-protection laws," the information would "have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole."). Despite some language in *Teraoka*, 509 F.2d at 579, and *Corcuera-Valor*, 910 F.2d at 199-200, that swept more broadly, neither case ruled out the sufficiency of proof of that character to establish the required nexus.[3]

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[3] The Fifth Circuit's earlier decision in *United States* v. *Ven-Fuel, Inc.*, 602 F.2d 747, 753 (1979), cert. denied, 447 U.S. 905 (1980), upon which *Corcuera-Valor* relied, is similarly distinguishable. There the court of appeals recognized that materiality depends on "a reasonable showing of the *potential effects* of the statement," but held that the false statement there was not material because it had "no significance whatsoever with respect to the actual importation"; there was, in other words, "no logical nexus"

To be sure, there is one sense in which *Teraoka* and *Corcuera-Valor* may differ from *Holmquist*, 36 F.3d at 154, *Bagnall*, 907 F.2d at 436, and the decision below, Pet. App. 11a, but it is not one that would alter the result in this case. *Teraoka* and *Corcuera-Valor* both appear to indicate that Section 542 requires not only that the false statement be material, but also that it be material *to the customs official's decision on whether to permit importation.* See p. 9, *supra.* The decisions in this case, in *Holmquist*, and in *Bagnall*, by contrast, all suggest that the false statement or document need be material only in a more generalized sense, *i.e.*, the statement or document is material if it has the potential significantly to affect the importation process or Customs Service operations (such as where it might reasonably prevent Customs from imposing an otherwise appropriate duty on the item), even if it could not affect whether or not the item would actually be admitted into the country.[4]

That difference, however, may not represent a true circuit conflict, as earlier decisions from the Fifth and Ninth Circuits, contrary to *Teraoka* and *Corcuera-Valor*, uphold convictions under Section 542 even where the false statements only had the potential to affect the importation process (such as applicable tariffs) and not

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between the false statement and the likelihood that the merchandise would be admitted. *Ibid.* (emphasis added).

[4] *Holmquist*, 36 F.3d at 159 ("a false statement is material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole"); Pet. App. 11a (same); *Bagnall*, 907 F.2d at 436 (false statement under Section 542 is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way").

whether importation would actually occur.[5] But to the extent such a conflict might exist, it is not implicated here. In this case, both the district court and the court of appeals specifically found that the false statements had a natural tendency to affect not only the importation process as a general matter but also whether the Phiale would have been admitted at all. See pp. 9-10, *supra*. Consequently, the false statements would have been material even if materiality *to importation* were required, as under *Teraoka* and *Corcuera-Valor*.

Finally, since *Teraoka* and *Corcuera-Valor* were decided, this Court has espoused a "natural tendency" test for materiality under a number of statutory schemes, and has stated that the "natural tendency" test generally governs questions of materiality. See p. 8, *supra* (citing *Neder*, 119 S. Ct. at 1827; *Gaudin*, 515 U.S. at 509; and *Kungys*, 485 U.S. at 770). In fact, all of the Section 542 cases petitioner (Pet. 9-10) and the court of appeals (Pet. App. 9a) describe as having adopted petitioner's but-for causation test pre-date those decisions, with the exception of *Corcuera-Valor*; and *Corcuera-Valor* pre-dates all of those decisions but *Kungys*. Moreover, the Ninth Circuit has not relied on *Teraoka* since it was decided in 1982, and the Fifth Circuit has not relied on *Corcuera-Valor* since it was decided in 1990. Accordingly, it is entirely possible

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[5] *United States* v. *Steinfels*, 753 F.2d 373 (5th Cir. 1985) (holding that false statement that imported automobiles were for personal use and thus exempt from customs duties "effected the duty-free entry of the cars" and thus supported conviction for introducing imported automobiles "by means of false statements"); *United States* v. *Rose*, 570 F.2d 1358 (9th Cir. 1978) (upholding conviction based on fraudulent failure to list goods on customs declaration, even though the goods would have been admissible had they been declared).

that, even if those decisions could be read as requiring proof of but-for causation, the Fifth and Ninth Circuits would feel free to reconsider them and select the "natural tendency" test repeatedly endorsed by this Court since those cases were decided. See also pp. 11-12, *supra* (noting that *Teraoka* and *Corcuera-Valor* conflict with prior Fifth and Ninth Circuits decisions).[6]

b. The standard of materiality adopted by the court of appeals in this case was in any event correct. As explained above (p. 8, *supra*), this Court has repeatedly endorsed the "natural tendency" test as the ordinary measure for determining materiality. Petitioner does not contend otherwise. Petitioner, however, argues that Section 542 must contemplate a "but-for" standard for materiality because Section 542 applies only when the defendant imports or attempts to import merchandise "by means of" the false statement. That reasoning is not correct.

Petitioner errs in assuming that the phrase "by means of" is properly understood as imposing a requirement of but-for causation. The phrase "by means of" connotes not that the government must prove that, but for the false statement, the good would not have been imported; rather, it connotes assistance, use and employment, as well as instrumentality and agency.[7] As a result, one who employs a false statement as an instrument in importing merchandise has violated the

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[6] The fact that this issue has not arisen with more frequency belies petitioner's contention (Pet. 8) that the proper test for materiality under Section 542 is an important issue that presently requires this Court's attention.

[7] See *Webster's Third New International Dictionary* 307 (3d ed. 1986) (defining "by means of" as "through the agency or instrumentality of"); *id.* at 2384 (defining "through" as "by means of" and equivalently "by the help or agency of").

statute by importing goods "by means of" the false statement.[8] Even if the same merchandise also could have been imported using a true statement—*i.e.*, the goods could have been imported "by means of" the truth—that would not alter the fact that the defendant conducted the importation by means of false statements. Indeed, that should be especially apparent given that the statute extends not only to false statements but also to any false or fraudulent "invoice, declaration, affidavit, letter, [or] paper." 18 U.S.C. 542. One who uses a falsified or fraudulent document in importing merchandise imports the item "by means of" the false document within the ordinary meaning of that phrase, even when it might also have been possible to import the item "by means of" a true document.

Finally, petitioner's contention that Section 542 applies only to false statements that result in the entry of otherwise non-importable merchandise would impose an extraordinary and unusual burden on the government—the burden of proving what *might have been* ("what would have happened if a truthful statement had been made," Pet. App. 11a)—and is difficult to reconcile with the remainder of Section 542's language. The first paragraph of Section 542 prohibits the actual or attempted importation of merchandise by means of fraudulent or false documents or statements "whether or not the United States shall or may be deprived of any lawful duties." 18 U.S.C. 542. Lawful duties can be owed only on merchandise that would not, if truthfully described, be barred from entry. The statutory reference to duties potentially owed in connection with the

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[8] The materiality requirement then applies to ensure that the nature of the false statement is sufficiently important to warrant prohibition.

goods introduced "by means of" false statements or documents thus indicates that the provision is not limited to fraudulent introduction of merchandise that would not otherwise have been admitted.[9]

2. Petitioner next contends (Pet. 14-18) that the court of appeals' decision that the forfeiture of the Phiale did not violate his due process rights "conflicts with decisions of this Court relating to the due process protections applicable to forfeiture statutes." Pet. 14. No such conflict exists.

Petitioner appears to rely primarily on the statement in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), that "it would be difficult to reject the constitutional claim of * * * an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Pet. 15. As the court of appeals correctly noted (Pet. App. 17a), this Court in *Bennis* v. *Michigan*, 516 U.S. 442, 450 (1996), labeled that statement "*obiter dictum*," and declined to apply it, even when the petitioner lacked knowledge that the forfeited property had been an instrumentality of illegal activity.

Petitioner attempts (Pet. 15-18) to distinguish *Bennis* by noting that, in *Bennis*, the forfeiture had an effect on the wrongdoer; here, he contends, "the full effect of this

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[9] Petitioner's construction is also difficult to reconcile with the fact that Section 542 criminalizes "attempts" to import merchandise "by means of" false statements. See 18 U.S.C. 542 (offense committed by whoever "enters or introduces, or attempts to enter or introduce * * * merchandise by means of" falsity). If materiality required a showing that, "but for" the false statement, the merchandise would not have entered the country, then it arguably would not be possible to prosecute attempts to import the goods when the goods are seized before entry.

forfeiture will fall solely on [petitioner], who is not alleged to have committed any wrongdoing." Pet. 17.[10] *Bennis* did not draw that distinction, but even if *Bennis* could be so distinguished, petitioner is factually incorrect to assert that he alone will bear the loss associated with the forfeiture here. The Terms of Sale for the Phiale specifically address the risk of forfeiture, see Pet. App. 4a, 47a; p. 2, *supra*, and petitioner therefore may be entitled recover his losses from the sellers, including Haber (upon whom petitioner places primary responsibility). Moreover, it is not clear that petitioner was wholly innocent. As the district court explained, there was evidence that suggested petitioner's "culpability" and tended to "detract from his claim of innocence." Pet. App. 48a.

3. Finally, petitioner contends (Pet. 18-24) that the forfeiture of the Phiale is an "excessive fine" under the Eighth Amendment. He maintains (Pet. 18-19) that the court of appeals' decision conflicts with this Court's decisions in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), and *Austin* v. *United States*, 509 U.S. 602 (1993), as well as with several post-*Bajakajian* decisions of the courts of appeals, including *United States* v. *817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304 (11th Cir. 1999), petition for cert. pending, No. 99-6374 (filed Sept. 7, 1999); *United States* v. *3814 NW Thurman Street*, 164 F.3d 1191, amended, 172 F.3d 689 (9th Cir. 1999); *Yskamp* v. *Drug Enforcement Admin.*, 163 F.3d 767 (3d Cir. 1998); and *United States* v. *Real Property Known*

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[10] Petitioner also suggests that the Court's opinion in *Bennis* was joined by only four Justices (Pet. 15), but in fact five Justices joined the majority opinion, with Justices Thomas and Ginsburg also filing separate concurring opinions.

as 415 East Mitchell Avenue, 149 F.3d 472 (6th Cir. 1998).

Petitioner misconstrues this Court's Eighth Amendment holdings. In *Austin*, the Court held that the Eighth Amendment applies to an *in rem* forfeiture only when the forfeiture constitutes "punishment" in some sense. *Austin*, 509 U.S. at 610. In holding that civil forfeiture under 21 U.S.C. 881 of a mobile home and an auto body shop were subject to the limitations of the Eighth Amendment's Excessive Fines Clause, the *Austin* Court explained that the inclusion of an innocent owner defense in Section 881 reveals a "congressional intent to punish * * * those involved in drug trafficking." *Austin*, 509 U.S. at 619. The Court contrasted forfeitures under the narcotics statutes with "the forfeiture of goods involved in customs violations." *Id.* at 621. The latter are not considered to be punishment, but "a reasonable form of liquidated damages." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972).

In *Bajakajian*, the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. The Court had "little trouble concluding" that the forfeiture of currency under 18 U.S.C. 982(a)(1) "constitutes punishment." 524 U.S. at 328. The Court explained that the forfeiture in *Bajakajian* did "not bear any of the hallmarks of traditional civil *in rem* forfeitures":

> The Government has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to

> punish the offender, and cannot be imposed upon innocent owners.

Id. at 331-332.

As the court of appeals recognized (Pet. App. 19a), the present case is quite different from *Bajakajian*. First, this case, unlike *Bajakajian*, "was not part of a criminal prosecution." Pet. App. 18a. Second, this case involves the violation of "a customs law, traditionally viewed as non-punitive," in contrast to the criminal forfeiture provision at issue in *Bajakajian*. *Id.* at 19a. And third, the forfeiture in this case does serve an important remedial purpose, namely the return of a valuable artifact to its country of origin in accordance with foreign law. See *id.* at 5a. No interest in the forfeited item is to be retained by the United States.

Nor does this case conflict with the post-*Bajakajian* appellate forfeiture decisions cited by petitioner. See Pet. 23. Three of those cases, like *Austin*, involved narcotics-related forfeitures (two under 21 U.S.C. 881), and all three were upheld in the face of Eighth Amendment challenges. See *Wilton Manors*, 175 F.3d at 1310-1311 ("the forfeiture of a $70,000 property based on those crimes does not violate the Eighth Amendment"); *East Mitchell Avenue*, 149 F.3d at 478 ("no gross disproportion between the value of the property [forfeited] and the gravity of the offense," which "involved a sophisticated, on-going cultivation operation"); *Yskamp*, 163 F.3d at 773 (forfeiture of aircraft worth more than half a million dollars "was not excessive").

Thurman Street is the only court of appeals decision cited by petitioner in which the forfeiture was held to be an excessive fine, but that case involved an unusual situation in which no injury was "suffered by the government or any other party, as the fraudulently-

obtained loan will be fully repaid." *Thurman*, 164 F.3d at 1198. Here, the Republic of Italy was sufficiently harmed by the loss of a valuable antique artifact that it submitted a Letters Rogatory Request to the United States in an effort to remedy that harm. See Pet. App. 5a.[11] Moreover, as the district court explained, the violation here—making false statements so as to permit trafficking in cultural artifacts—is a serious one. *Id.* at 48a.

Finally, this case would not in any event be a good vehicle for addressing any Excessive Fines Clause issues. The lack of clarity in the record concerning the extent to which petitioner has already been compensated or is entitled to compensation for the forfeiture under the terms of the purchase agreements, see Pet. App. 4a, 47a; p. 2, *supra*, makes this case particularly unsuitable for balancing the amount of the forfeiture with the gravity of any underlying offense. See *Bajakajian*, 524 U.S. at 339-340.

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[11] Petitioner also cites (Pet. 23) a District of Columbia Court of Appeals case, *One 1995 Toyota Pick-up Truck* v. *District of Columbia*, 718 A.2d 558 (D.C. 1998), in which that court held that the forfeiture of a truck valued at $15,500 was an excessive fine for a first offender's solicitation of prostitution, under an earlier version of a local statute that imposed a maximum fine of $300 for such a first offense. The facts of *One 1995 Toyota* and the statute at issue in that case are markedly different from the facts and statute involved in the present petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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